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Appeal of:

Stephanie Wallace

Appeal No. 17747

Re: 5013 Belt Road, NW

**PRE-HEARING BRIEF BY APPLICANTS FOR PARTY STATUS
IN SUPPORT OF
DECISION OF THE ZONING ADMINISTRATOR
TO DENY A BUILDING PERMIT**

Mary Grumbine and Jack Simmons, applicants for party status ("Applicants")¹ in the referenced matter, submit this pre-hearing brief in support of the September 2007 decision of the D.C. Zoning Administrator ("ZA") to deny a building permit application regarding 5013 Belt Rd., NW.

The ZA determined that the building permit must be denied for two reasons. First, at the time of the application for the building permit at issue, the wood frame house with non-conforming side-yard setbacks had ceased to exist and, as a matter of law, the new construction must conform to current side-yard setbacks and cannot grandfather any pre-existing side-yard setbacks. Second, the destruction of the wood frame house was not a result of an Act of God or a casualty, but rather the result of the lack of maintenance of the structure. Therefore, as a matter of law, the Developer cannot avail herself of any purported reconstruction rights.

The ZA's decision should be upheld and the Developer should be required to raze the

¹ Ms. Grumbine and Mr. Simmons are co-owners of 3952 Garrison St., NW (and have lived there for thirty years), one of the properties that abuts the 5013 Belt Road property at issue here, are directly and adversely affected by the activities of the Developer, and appear in support of the decision of the Zoning Administrator.

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17747
EXHIBIT NO. 26

McMansion. The facts also show that there are additional reasons why the building permit should be denied, including the fact that the side-yard setbacks of the partially framed-in McMansion are far less than the minimum of five feet. Finally, the facts show that the real damage in this matter is the damage inflicted on the neighborhood and the City by Developer's conduct that can only be described as either intentional or reckless.

Introduction

This case involves a Developer (the Appellant) who purchased a charming, small pre-1933 wood frame farm house on a very small lot in 2004 for the purpose of building a McMansion in its place. Her actions in regard to the construction of the McMansion have been consistently either reckless or intentional. It is abundantly clear from the facts – including the chronology of events, including Developer's actions and inactions, the photographs, the documents, and other evidence – that Developer not only fully intended to destroy the entire original structure as soon as she had a large portion of the McMansion framed but went about this in a way to try to keep her true intentions from both the neighbors and the District. The Developer engaged in a course of conduct which has resulted, over the last three years, in tremendous damage to the immediate neighbors and the neighborhood, damage that continues to this day.

Argument

I. THE DECISION OF THE ZONING ADMINISTRATOR IS CORRECT AS A MATTER OF LAW AND FACT.

The decision of the ZA is correct for each of the two reasons set forth in the September 2007 denying Developer's latest application for a building permit. It is correct for other reasons as well.

A. The Absence of Any Remaining Non-Conforming Structure Precludes Grandfathering of Any Pre-Existing Non-conforming Side-Yard Setbacks.

The fundamental, indisputable, and dispositive fact of this appeal is that the original non-conforming structure has physically ceased to exist. The last remaining portion of the pre-existing farm house at 5013 Belt Rd., NW, was taken down – without an appropriate raze permit – on March 15-17, 2007, by Developer’s own work crew, as amply documented in the pictorial and documentary record.

Since there is no longer a physical structure at 5013 Belt Rd., NW, there is obviously no non-conforming structure to which the five foot side-yard setbacks permitted under 11 DCMR § 405.8 may be applied. Developer, therefore, must conform to eight-foot setbacks.

As recognized by the BZA in Appeal of 1231 Morse St., Inc., Appeal No. 17657, Transcript of January 8, 2008, a grandfather provision, such as section 405.8, may be applicable only where the pre-existing structure continues to exist. Once a pre-existing structure is razed, the Developer may not construct a non-conforming structure as a matter or right under a grandfather provision. Id. Any new construction, including the partially framed-in McMansion now on 5013 Belt Rd., must conform the eight-foot side yard setbacks applicable in Zone R-1-B. This matter is fully addressed in Applicants’ Motion to Dismiss and that discussion is incorporated here by reference.

B. The “Unforeseen” Termite Damage Is Not an Act of God or Casualty.

Clearly aware that the absence of a non-conforming structure terminates any right to avail herself of the side-yard grandfather provisions of 11 DCMR § 405.8, Developer seeks to avail herself of 11 CDMR § 2001.6, which permits the re-construction of a pre-existing structure if that structure is lost by reason of Act of God or casualty and can be reconstructed within certain

financial parameters. She argues that the destruction of the front portion of the house on March 15-17 should be treated as a casualty or Act of God. It is neither. Developer's argument fails for any of three separate reasons.

In the first place, both Act of God and casualty require a sudden loss. Skandia Insurance Co., Ltd., v. Star Shipping AS, 173 F. Supp.2d 1228, 1239-40 (S.D. Ala. 2001) (admiralty case) and cases cited therein (Act of God requires events that are so extraordinary that there is no reasonable warning of them and for which there is no contributing human negligence). As noted in Skandia, which contains a lengthy, scholarly discussion of the doctrine and its application, the classic case of Act of God is a hurricane. Moreover, to invoke the doctrine of Act of God, the occurrence must be something that is not preventable by the exercise of reasonable care. Id. at 1241. See 1231 Morse St., Inc., supra; National Association of Postmasters of the United States v. Hyatt Regency Washington, 894 A.2d 471, 476-77 (D.C. 2006) (events transpiring more than a year earlier cannot constitute an emergency or Act of God).

There can be no real dispute that termite damage is not like a hurricane. It occurs over time, as termites find a wooden structure, start to infest it, spread out, and consume the wood in the structure. Termite damage, therefore, is clearly far more akin to long-term erosion, which is never deemed an Act of God or a casualty, to a hurricane, earthquake, or flood. Termite damage, no matter how serious it may ultimately become, lacks the inherent element of suddenness needed for Developer to be able to invoke casualty or Act of God.

In the second place, as the ZA noted, the ultimate termite damage to the structure was the result of lack of maintenance, not a sudden event. The facts of this matter amply support that conclusion.

Developer contracted to purchase the house in March 2004. When conveyed to her in

April 2004, it was conveyed to her “as is” and the termite inspection clause was explicitly removed from the sales contract. Thus, she had almost *three years* in which to inspect for termites and, if appropriate, treat for termites before March 2007. She did not do so. Amazingly, even after the Developer claims to have learned of termites in the back portion of the house in March 2005, she still took no steps to either inspect for termites in the front part of the wooden house or treat for them. Had she done so, found termites at the front of the house, and taken appropriate steps to deal with them, this would be a completely different case.

Of course, all one needs to do is turn on the television to see advertisements from Orkin, Terminix, or other firms for termite inspection, termite treatment, and termite warranties. Many of those warranties and treatment plans cost only several hundred dollars per year. Apparently, while Developer is able to commit hundreds of thousands of dollars to this construction project, see Motion for Summary Judgment and attached affidavit, she cannot spend several hundred dollars per year for two or three years to protect the structure from which she claims to grandfather her construction.

As if turning a blind eye to the possibility of termite damage or any other structural problems were not enough, the icing on the cake comes when Developer removed the roof of the pre-existing structure in early 2005, failed to enclose the remaining structure after razing the back portion, and for over *two* years leaving that structure open to the elements. Did the Developer really believe that the structure would preserve itself?

Each and every one of these actions and inactions belies any intent on the part of the Developer to retain any portion of the original structure. They are consistent only with an intent to bring about the ultimate destruction of the totality of the pre-existing non-conforming structure and replace it with the McMansion. This intent is underscored by the fact there is no

evidence of any structural inspection or study of the pre-existing structure until just prior to January 2007.

More importantly, in March and April 2004, Developer purchased the property “as is” and the termite clause was removed from her sales contract. Seller, that is, made no warranties about termites and provided no termite inspection report. This constitutes knowledge of facts and circumstances to give a reasonable person (and she was more than this as she had been identified as an experienced developer) reasonable grounds for inquiry into whether there were termites in the remainder of the small structure. Clay Properties, Inc., v. Washington Post, 604 A.2d 890, 895 (D.C. 1992); Rosenthal v. J. Leo Kolb, Inc., 97 A.2d 924 (D.C. Muni. App. 1953) (“The knowledge of facts or circumstances reasonably sufficient to put a person of ordinary prudence upon inquiry which, if pursued with proper diligence, would lead to the discovery of the actual condition . . . is equivalent to knowledge direct and certain). See Rafferty v. D.C. Zoning Commission, 583 A.2d 169, 176 (D.C. 1990). Thus, Developer is imputed with knowledge of the termites at least from March 2004. Moreover, on March 3-4, 2005, Developer acknowledges actual knowledge of the presence of termites in part of the structure. Termite damage, therefore, is not a sudden occurrence.

In the third place, given Developer’s imputed or actual knowledge of termites and her otherwise inexplicable inaction, any damage to the structure from the termites is a self-inflicted injury. “According to the self-created hardship rule: ‘If the peculiar circumstances which render the property incapable of being used in accordance with the restrictions in the ordinance have themselves been causes or created by the property owner, . . . the essential basis of a variance – that is, the hardship to be caused solely through the manner of operation of the ordinance upon the particular property – is lacking. In such a case, the variance may not be granted.’ ” Foxhall

Community Citizens Ass'n v. D.C. Bd. of Zoning Appeals, 524 A.2d 759, 761 (D.C. 1987), quoting 3 Rothko and Rothko, The Law of Zoning and Planning, § 39-01 94th ed. 1986).

Finally, the casualty / Act of God provision simply has no application here because Developer is not seeking to reconstruct the pre-1933 farm house. Rather, she seeks to construct a wholly new portion of that original building and engraft it onto the frame of the McMansion she has built (with non-conforming side yard setbacks). In sum, she seeks authorization for a wholly new structure, not a reconstruction.

In sum, there is no Act of God or casualty from which Developer may invoke the provisions of 11 DCMR § 2001.6.

C. The Permit Application Must Be Denied because the Framed-In McMansion Is Not in Compliance with Grandfathered Side-Yard Setbacks.

Although not relied upon by the ZA, there is yet an additional reason why the Developer may not be issued the building permit she seeks. The new construction has side-yard set backs of substantially less than five feet.

As noted above, the July 2004 plat map from the D.C. Surveyor's office that was to go along with the permit application shows side-yard setbacks of five feet on both the north and south sides. Those setbacks are shown for both the pre-1933 farm house and for the proposed addition for which the permit was sought. 11 DCMR § 405.8, the grandfather provision, allows pre-1958 side-yard setbacks to be retained so long as those setbacks are at least five feet. In other words, no addition may be made to any pre-existing 1958 structure where the addition's setbacks are less than five feet.

Developer has violated that provision. As shown by the exterior walls visible in several of the photographs, the addition is much wider than the original house – i.e., the side-yard

setbacks are significantly less than five feet in the new structure. Accordingly, the new structure itself violates the side-yard setback provisions of both the current zoning regulations and the grandfather provisions. The structure is illegal and must be removed.

Developer may well assert that this construction was based on approved plans and that such approval gives her a right to rely on those plans and the permit. Any such reliance would be improper. In the first place, it would inflict (and, in fact, has inflicted) substantial hardship on the neighbors. In the second place and more important, the provisions of the zoning regulations apply to everyone. Neither the ZA nor anyone else has the authority to authorize any work beyond that which is permissible under the regulations. Neither the ZA nor any other DC official, therefore, could authorize any addition to 5013 Belt Rd., that had side-yard set backs of less than five feet because no D.C. official has the authority to permit illegal work. Moreover, in dealing with those officials, the Developer is imputed with knowledge of the scope of their authority of those officials. Coffin v. District of Columbia, 320 A.2d 301 (DC 1974); District of Columbia v. McGregor Properties, Inc., 479 A2.2d 1270; Perpetual Building Limited Partnership v. District of Columbia, 618 F.Supp. 603, 614 (D. D.C. 1985); Orange v. District of Columbia, 59 F3d 1267, 1271 (D.C. Cir. 1995) (“[I]t is well established that those who contract with a municipal corporation are imputed with knowledge of the limits of the agent’s actual authority.”).

According, the requested building permit must be denied because the structure does not conform with either present or grandfathered side-yard setback requirements.

II. NEITHER THE DOCTRINE OF EQUITABLE ESTOPPEL NOR THE DOCTRINE OF LACHES HAS ANY APPLICABILITY TO THESE CIRCUMSTANCES.

Developer asserts that the government is estopped from denying her the requested building permit and/or it is barred by laches from doing so. Laches and estoppel are very rarely

ever applied against the government because of the public interest in the enforcement of the zoning laws. Sisson v. D.C. Bd. of Zoning Adjustment, 805 A.2d 964, 971(D.C. 2002); Beins v. D.C. Bd. of Zoning Adjustment, 572 A.2d 122, 126 (D.C. 1992); 4 Rathkop, *The Law of Zoning and Planning*, § 65:27 (4th ed.). To apply either of those doctrines requires particularly compelling proof of each of the elements. There are many reasons why these doctrines are not applicable in this situation and we address only several of the elements of them.

At the outset, it must be noted that the BZA need not even reach the questions. It is sufficient to note that Developer's new construction has side-yard setbacks that violate both the present zoning regulations and the grandfather provisions for pre-1958 structures and, therefore, she has no legal right to such a structure and the government cannot be compelled to authorize that illegal structure and, in fact, the government would have been fully authorized to revoke any of her prior permits had that fact come to light. See American Towers, Inc. v. Williams, 146 F. Supp. 2d 27 (D. D.C. 2001). She may not invoke either equitable estoppel or laches to obtain an otherwise illegal building permit. In fact, as in American Towers, the government should properly require the dismantling of the flimsy, weather-beaten structure (and foundation) now on the property.

A. The Doctrine of Equitable Estoppel Has No Applicability because, at least, Developer Had No Reasonable Reliance and because Developer Has Not Proceeded in Good Faith.

To invoke estoppel, this Developer must show “(1) expensive and permanent improvements, (2) made in good faith, (3) in justifiable and reasonable reliance upon (4) affirmative acts of the District government, (5) without notice that the improvements might violate the zoning regulations; and (6) equities that strongly favor the [Developer].” Bannum v. D.C. Bd. of Zoning Adjustment, 894 A.2d 423, 431 (D.C. 2006), quoting Interdonato v. D.C. Bd.

of Zoning Adjustment, 429 A.2d 1000, 1003 (D.C. 1981). Failure to demonstrate any one of these elements is fatal to Developer's claim. Id.

It is readily apparent, at the outset, that Developer simply cannot meet the requirements of element (5). As noted above, because the side-yard setbacks are now less than five feet, her current structure is unambiguously impermissible under either the grandfather provisions or the current zoning regulations. The regulations themselves give Developer notice that her structure "might violate" those regulations.

Just as important, the entire course of conduct here strongly disfavors the Developer. We here highlight, in bullet point fashion, only some of the facts that address the "good faith" improvements and the equities.

- As discussed above, Developer never undertook any timely inspections that a reasonable person would have undertaken for termites, structural soundness, lead paint, etc. Her actions are not compatible with a good faith effort to preserve and add to the pre-existing structure.

- Developer, even when she had actual notice of termites, did nothing to determine the extent of the problem or to deal with it in a way that would preserve the pre-existing structure.

- Developer applied for and obtained a series of building permits in this project. Each and every one of those permits was violated by the Developer and a stop work order was issued for work exceeding those permits.

- The violations of the permits in each case consisted of performing work that was outside the scope of the permit.

- Most of the work performed out of the scope of the permits was piece-by-piece

razing of the original structure – without a raze permit – until nothing of the original structure remained.

- Developer left the original, un-razed portion of the house without a proper roof, without proper protections from the elements, and without proper shoring from March 2005 to March 2007.

- Furthermore, Developer has done nothing to protect the integrity of the wholly new structure she has built, allowing it to sit open and weather since each of the pieces was erected.

- Developer has not protected the property with a construction fence or any other barriers.

B. The Doctrine of Laches Has No Applicability Here.

For laches, Developer must prove that the government has engaged in lengthy and unjustifiable inaction on her permit application to her detriment.

The permit application at issue here is the application that Developer submitted after the stop work order of March 21, 2007. Thus, the period of the allegedly improper government inaction must be measured from the date of that application.

Here, it is apparent that from the time the application was submitted, there was no undue delay in reviewing and acting on it. In fact, during the summer of 2007, there was correspondence and at least one meeting between the Developer and D.C. officials regarding the zoning issues raised by the application. Shortly thereafter, in September 2007, the Zoning Administrator's decision was issued. Moreover, Developer engaged in no construction activity during this time.

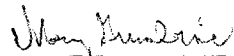
Accordingly, the government may not be barred by laches from denying Developer's

permit application.

Conclusion

For all of the foregoing reasons, the Notice of Appeal in this matter fails to set forth a claim upon which relief may be granted and the appeal should be dismissed.

Respectfully submitted,



Mary Grumbine
3952 Garrison St., NW
Washington, DC 20016
Applicant for Party Status



Jack Simmons
3952 Garrison St., NW
Washington, DC 20016
Applicant for Party Status

Certificate of Service

This is to certify that the foregoing Pre-Hearing Brief was served on each of the following by first class mail, postage prepaid, on April 24, 2008:

J. Patrick Brown, Esq.
Greenstein DeLorme & Luchs, PC
1620 L. St., NW, Suite 900
Washington, DC 20036

Matthew J. Green, Esq.
Assistant Attorney General
D.C.R.A.
941 North Capitol St., NE, Ninth Floor
Washington, DC 20002

Mr. John Lemoine
5011 Belt Road, NW
Washington, DC 20016



Jack Simmons